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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

PEOPLE OF THE STATE OF MICHIGAN,
Petitioners,

vs.

JAMES WHITE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

The Petitioners, the People of the State of Michigan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Michigan entered in this proceeding on September 6, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported as *People* v *White*, 392 Mich 404, 221 NW 2d 357 (1974), and appears in the appendix hereto. The opinion of the Court of Appeals of the State of Michigan is unreported but appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 6, 1974. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTION PRESENTED

Whether A Warrantless Search And Seizure Of A Pistol From The Trunk Of Defendant's Automobile Parked On The Public Street Across From His Apartment Building Conducted Contemporaneously With His Arrest Is Either Properly Within The Automobile Exception or Reasonable In View Of *Cady* v *Dombrowski*?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which this Petition involves is the Fourth Amendment to the United States Constitution which provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A Detroit bus driver named Lucian Fryling was fatally wounded at approximately 8:00 p.m. on the night of November 18, 1964. Moments after the fatal shots, two eyewitnesses saw a man hurry from the bus in which the slain busdriver lay. Although the witnesses were unable to see the man's face, nevertheless they retained and related to the police the man's general description.

One week later, on November 25, 1964, the police received information from a Joe Smith which led them to Dan Johnson, the informer and principal witness in this case. When Johnson learned that the police were looking for him in connection with this crime, he voluntarily appeared at the precinct station. He informed the police that he had reason to believe that James White was responsible for the death of the bus driver. He recounted that he

had been at the scene of the crime with White four or five times between 7:00 and 9:00 p.m. on evenings preceding the crime. He said that their purpose was to watch the buses and to plan a robbery of a bus driver. Johnson further informed the police that earlier on November 18, 1964, he had been with White and Bill Smith in White's car and that White asked Johnson what he was doing around 7:00 p.m. because he was going to get a bus. Johnson informed the police that he did not see White again that day. Johnson also described to the police a gun that he had seen in White's bedroom one month before the killing and told them that White kept the gun in either a bedroom drawer or in the trunk of his automobile under some rags. He described the car as a 1956 yellow, two-door Ford with a big dent in the back of the trunk which had an outside padlock. He also told the police he believed White would resist arrest. This information was given to the police from 12:30 until 2:00 a.m. on Thanksgiving Day, November 26, 1964, a day that no magistrate was available. At trial Johnson testified to those facts he had related to the police.

Acting upon Johnson's information the police immediately went to White's apartment and arrested him at 2:15 a.m. At this point the police believed the defendant had committed another killing. The police asked White for his car keys and, upon receiving them, searched the trunk of his car parked on the street in front of his apartment. The gun was found in the trunk under some rags. During the period that the police were making the arrest, White's wife was present.

Defendant White made an unsuccessful pre-trial motion to suppress the admission of the gun based upon an un-

lawful search and seizure. This motion was renewed at trial and was denied. The weapon was introduced into evidence and was shown to be the murder weapon. The jury rendered a verdict of guilty of first degree murder on April 13, 1965, and the defendant was sentenced to life imprisonment.

The foregoing facts appear in the decision of the Michigan Supreme Court.

The Court of Appeals of the State of Michigan entered a judgment affirming the conviction on June 28, 1972. The Supreme Court of the State of Michigan entered it's opinion reversing the conviction on September 6, 1974.

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT OF THE STATE OF MICHIGAN DECIDED THE ISSUE IN A WAY NOT IN ACCORD WITH THE DECISIONS OF THIS COURT.

The Michigan Supreme Court reversed the murder conviction in this case, holding that the search and seizure violated the protection of the Fourth and Fourteenth Amendments and the Michigan Constitution of 1963, Art 1, § 11. Parenthetically it must be noted that the Michigan Supreme Court, in accord with Michigan law, recognizes that it is precluded from setting a higher standard of reasonableness under the Michigan search and seizure clause than the United States Supreme Court maintains as applicable under the Fourth Amendment. *People v Moore*, 391 Mich 426; 216 NW 2d 770 (1974). The basis for the Michigan court's holding was its belief that the automobile exception is not applicable to this case because the circumstances here do not present the exigent circum-

Indeed the circumstances in *White* were even more exigent than those in *Chambers* in this last regard because all four occupants of Chambers car were arrested and their friends were not alerted to their quandary. See *Cardwell*. Despite the fact that the *Chambers'* vehicle was stopped on a public road and the *White* vehicle was parked, the *White* vehicle was more likely to be moved from the jurisdiction in frustration of any forthcoming search. To say that the police could have prevented the wife from removing the vehicle from the jurisdiction while a warrant was sought is to admit to the very crux of *Chambers*. An effective search requires either an immediate search or what effectively constitutes a seizure of the automobile. The Court in *Chambers* sees no difference between the two.

Furthermore there is a lesser intrusion in *White* than in *Chambers* or *Coolidge* insofar as the wife is at least given use of the automobile because an immediate search rather than a seizure of the vehicle is employed.

The Michigan Supreme Court's finding that there was no probable cause to arrest White and to search his automobile because Dan Johnson was not shown to be reliable is also clearly erroneous. The court's reliance on the lack of prior contact between Johnson and the police to establish a history of reliability and on the fact that Johnson was neither a police officer, a victim, nor an uninvolved eyewitness is superficial. The only other factor the court mentioned in finding an insufficient showing of reliability was a claimed lack of corroborative facts within the knowledge of the officers.

Indeed the police did have corroboration and there are other factors to consider which do demonstrate reliability. Johnson had described to them the gun he had seen in

White's possession corresponding to the one used in the crime. Moreover the informant's statement to them constituted an admission against penal interest. See *Armour* v *Salisbury*, 492 F2d 1032 (CA 6, 1974). The specificity of Johnson's statement shows reliability. See *Harris* v *United States*, 403 US 573; 91 S Ct 2075, 29 L Ed 2d 723 (1971). The facts given by Johnson were within his personal knowledge. He was a named citizen informant. He was not a paid informant. See *Aguilar* v *Texas*, 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964).

Because both probable cause and exigent circumstances existed at the time of the search and seizure, the Michigan court's finding that the search and seizure was unreasonable is not in accord with the decisions of this Court.

Additionally the danger to the citizenry of leaving a deadly weapon untended in the trunk of an automobile parked on a public street where the officers had probable cause to believe in its presence renders such a search reasonable though without a warrant. To disregard *Cady* compounded the error of the Supreme Court of Michigan.

CONCLUSION

Wherefore, the Petitioners, the People of the State of Michigan, respectfully submit that for the foregoing reasons the Supreme Court of the State of Michigan has rendered a judgment in this cause which is contrary to the decisions of this Honorable Supreme Court of the United States of America, so that a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 30, 1974

OPINION

(State of Michigan—Court of Appeals)

Division 1

People of the State of Michigan, Plaintiff-Appellee, v James White, Defendant-Appellant.	No. 10396

(Filed June 28, 1972)

Before: Levin, P.J., R. B. Burns and Gillis, JJ.

Per Curiam

The defendant, James White, was convicted by a jury of murder in the first degree. MCLA 750.316; MSA 28.548.

A D.S.R. bus driver was shot during the night of November 18, 1964, and died early the following morning. Two eyewitnesses saw a man hurrying away from the bus after the shooting but they were not able to see the man's face.

The police were informed by Joe Smith that a young man named Dan Johnson knew something about the killing. Johnson learned that the police were looking for him, and at 12:30 a.m., November 26, 1964, he went to the police and gave information which implicated the defendant White.

At the trial Johnson testified that he and White had gone to the scene where the killing occurred on four or five occasions to watch the buses and that they were planning on robbing a bus. On November 18, 1964, the day of the shooting, they had discussed robbing a bus. The meeting took

place in White's car and a third person, Bill Smith, was present. Johnson claimed he did not see White again that day. Johnson identified a gun found in the trunk of White's automobile shortly after he was arrested as the gun he had seen in White's bedroom one month before the killing, and said that White sometimes kept the gun in the trunk of his automobile. Both Johnson and the police testified that Johnson had told the police on the morning of November 26 everything he was then relating on the stand.

Acting on the information supplied by Johnson the police hurried to White's apartment arriving at 2:15 a.m., November 26. Four police officers knocked on the door and, when White asked who it was, one of them replied that it was Jimmy Edwards. White opened the door a crack and the police pushed their way into his apartment and arrested him. The police then searched his apartment while others took the car keys and searched the automobile which was parked in front of the apartment house.

White was taken to the stationhouse and questioned. The police claim he gave four statements. None were signed.

In the first statement, given at 4 a.m., shortly after his arrest, White said that he had bought the gun (found in the trunk of the automobile) on November 24—6 days after the killing—from Bill Smith for $21. At the trial White admitted that he made that statement, but denied making the other three statements attributed to him.

The second satement was said to have been given by White 3½ hours later, at 7:30 a.m. In that statement White is said to have declared that he wished to change his original statement, that he had lied to protect his friend, Bill Smith, who actually murdered the bus driver. White said that at about 6:30 p.m. on the night of the shooting

he drove Smith to a place near where the killing occurred. Smith left the car to visit a girlfriend in a nearby apartment. White noticed that Smith had a revolver in his coat pocket at the time. Smith returned to White's automobile at about 8:30 and said that his girlfriend's husband had come home unexpectedly and an argument ensued in the course of which he had to fire the gun but missed. Subsequently White learned of the D.S.R. holdup murder and suspected Smith, and later Smith admitted the shooting to him.

In the third statement, given 12 hours later at 7:30 p.m., White said that he had introduced Johnson to Bill Smith, and "that Bill Smith at that time was interested in holding up D.S.R. coaches and he brought in Dan Johnson's name as being an expert on it. And that they picked up Dan Johnson near his home and he introduced Dan Johnson to this Bill Smith while he was in his car. They drove around, discussing the possibility and probabilities of D.S.R. holdups at this particular location, at LaSalle and Webb"—the place where the killing occurred.

An officer testified that White gave the fourth statement at 11:40 a.m., November 27, shortly before he was arraigned. White is said to have told the officer, in tears during a monetary loss of composure, "I didn't mean it, he lunged at me and the gun went off." The officer said that White immediately regained his composure and told the officer he was speaking of Smith. A short time later White said that they could eliminate Smith, that he was not involved in this, and that he would make a formal statement "if we [the police] could make some promises and we assured him we could not promise him anything."

White was arraigned on November 27 at 2 p.m., the first day the courts were open after his arrest. November 26, the day he was arrested, was Thanksgiving Day.

I.

A number of issues are raised on appeal. The principal issues center around the validity of White's arrest at his residence in the middle of the night and the validity of the search a short time afterwards of his automobile parked outside his residence, the police not having obtained a warrant for either his arrest or the search.

The arrest and search took place in November, 1965. This was 1 year before *Miranda*[1] was decided, and 4 years before *Chimel*[2] and 6 years before *Coolidge*[3] were decided.

Viewing the matter in retrospect—as of November, 1965—it appears clear that no police officer could have been expected to obtain an arrest warrant before making a felony arrest on probable cause.

In *People* v *Herrera*, 19 Mich App 216 (1969), our Court said that research had disclosed no case supporting the defendant Herrera's contention that a warrantless arrest, although on probable cause, is unlawful if the police had sufficient opportunity to obtain a warrant before the arrest.

Shortly after *Herrera* was decided, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc* declared, in what appears to be the first modern appellate court opinion focusing directly on the issue, that the Fourth Amendment right of the people to be secure in their persons and effects against unreasonable searches and seizures, which "assures citizens the privacy

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[1] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

[2] *Chimel* v *California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969).

[3] *Coolidge* v *New Hampshire*, 403 US 446; 91 S Ct 2022; 29 L Ed 2d 564 (1971).

and security of their homes unless a judicial officer determines that it must be overriden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect." *Dorman* v *United States*, 435 F2d 385, 390 (CADC, 1970). The Court emphasized that in cases of exigent circumstances or urgent need a warrant would not be required and listed among the factors to be considered the following: "first, that a grave offense is involved, particularly one that is a crime of violence," second, "that the suspect is reasonably believed to be armed." Third, that the information showing probable cause is especially clear. "Fourth, strong reason to believe that the suspect is in the premises being entered. Fifth, a likelihood that the suspect will escape if not swiftly apprehended." Sixth, that the entry can be made peaceably although in proper circumstances forcible entry might be justified. Seventh, the time of entry, it being less unreasonable to enter without consent during the daytime than during the night although, again, forcible nighttime entry may be justified in especially strong cases of exigent circumstances or urgent need.

On the facts presented in *Dorman* and in every case we have found accepting and adopting the *Dorman* rule, the warrantless, nighttime entries and arrests were found to be justified.[4] In each of these cases the defendant was charged with a crime of violence and was believed to be armed.[5]

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[4] See, *e.g.*, *United States* v *Harris*, 435 F2d 74 (CADC, 1970); *Vance* v *State of North Carolina*, 432 F2d 984 (CA 4, 1970). *Cf. People* v *Moreno*, — Colo —; 491 P2d 575 (1971). See, also, *Coolidge* v *New Hampshire*, *supra*, p 480.

[5] This important question of constitutional law was recently considered by the United States Supreme Court, but on the facts the Court found it unnecessary to resolve it. See *Johnson* v *Louisiana*, decided May 22, 1972, 40 LW 4524, 4527. See discussion 10 Cr L 1059, 4136-4137.

We are satisfied that the police officers who acted in this case cannot be faulted for not having anticipated *Dorman*, however clear it may be to some of us that the Fourth Amendment protects persons as well as property from unreasonable searches and seizures, and, unless there is need for acting without a warrant, a search or seizure is inherently unreasonable unless a judicial officer first makes an independent determination of probable cause.[6]

We conclude that, viewed in retrospect as of November, 1965, the officers could not have been expected to obtain an arrest warrant. Additionally, it probably was not possible to obtain one at 2 a.m. on Thanksgiving Day morning; the record does not show that an arrest warrant could have been obtained at that time. Moreover, the likelihood is that the circumstances justified immediate action by the police. It appears that persons other than Dan Johnson knew that he had gone to the police station to tell about the killing. Word that Dan Johnson was at the police station might have been communicated to White in the middle of the night giving him an opportunity to escape. The police had reason to believe that White was armed. Under all the circumstances, the police might have been justified in obtaining entry in the manner in which they did.

II.

We have also concluded that the police acted properly in seizing the gun found in the trunk of the automobile.

In *Chimel*, the United States Supreme Court limited the right of the police to search as an incident to an arrest to the area within the "immediate control" of the person being

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[6] See Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stanford L Rev 995 (1971).

arrested, and defined the phrase "immediate control" to mean "the area from within which he [the person arrested] might gain possession of a weapon or destructible evidence."[7]

In *Coolidge*, the Court ruled that a search of an automobile seized following the defendant's arrest in his home was invalid under the circumstances that there was no reason why the police could not have obtained a warrant before searching the automobile, and there was no danger, against which police could not guard, of the loss of evidence as a result of the delay which would have occurred had the police sought a search warrant before seizing the automobile.

The United States Supreme Court has held, however, that *Chimel* does not apply retroactively. The reach of *Coolidge*, as applied to a case such as this where the circumstances do suggest the possibility of loss of evidence and where waiting to obtain a search warrant probably would have meant a lengthy delay in acting, is not entirely clear.

The pre-*Chimel* law concerning the scope of permissible search as an incident to an arrest, as elucidated by courts throughout the land, is confusing. It would not be productive to attempt to understand and reconcile the plethora of conflicting pre-*Chimel* search incident authority. It appears on examination of search incident decisions of the Michigan Supreme Court[8] and of our Court decided after

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[7] *Chimel* v *California*, *supra*, p 763.

[8] See *People* v *Harper*, 365 Mich 494, 501 (1962); *People* v *Ritholz*, 359 Mich 539, 551 (1960); *People* v *Taylor*, 341 Mich 570, 577 (1954).

Harris,[9] *Trupiano*[10] and *Rabinowitz*,[11] and before *Chimel*, that the officers did not exceed established limitations in searching the trunk of the automobile without a warrant.[12]

III.

Turning to the other assignments of error, we have examined the transcript of the evidentiary hearing concerning the admissibility of White's statements and have concluded that the trial court did not clearly err in finding that they were freely and voluntarily given.

The delay between arrest and arraignment was not for the purpose of obtaining a confession.

The jury could reasonably infer from Dan Johnson's testimony that the bus driver was killed in an attempt to perpetrate a robbery and, thus, there is sufficient evidence, apart from the confessional statements attributed to White, that the bus driver was killed during the perpetration or attempt to perpetrate a felony mentioned in the first-degree murder statute.

The trial judge did not commit reversible error in allowing the two teenage eyewitnesses to testify concerning the man they saw running away from the bus after the

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[9] *Harris* v *United States*, 331 US 145; 67 S Ct 1098; 91 L Ed 1399 (1947).

[10] *Trupiano* v *United States*, 334 US 699; 68 S Ct 1229; 92 L Ed 1663 (1948).

[11] *United States* v *Rabinowitz*, 339 US 56; 70 S Ct 430; 94 L Ed 653 (1950).

[12] We also note that the officers had reasonable cause to believe, on the basis of the information obtained from Johnson, that the gun would be found in the trunk of the automobile. See A Model Code of Pre Arraignment Procedure, § 6.03 (Tent Draft No 3, 1970); *People* v *Danny S. Williams*, 383 Mich 549, 559 (1970).

shooting. On direct examination one of the boys pointed out White as the man he identified at the showup. On cross-examination that boy admitted, that because of the darkness, he was never really sure of the identification, and also admitted that he had picked two men out at the showup as looking like the killer, and that he never saw the killer's face. The other boy could not identify anyone either at the showup or at the trial. The testimony of these witnesses could not have influenced the jury.

There was no objection at the trial to the testimony of the ballistics expert who testified that the bullet that killed the victim was fired from the gun found in the trunk of White's automobile.

The trial judge did not err in refusing to allow inquiry concerning a possible lie detector test.

The judge's questioning of the witnesses did not exceed permissible limits.

Under the circumstances that Dan Johnson testified that the defendant White and he had been planning the commission of a D.S.R. bus robbery at the very location where the killing occurred, and that he had spent part of the day of the killing with White in the company of Smith, and officers testified that at one point White had accused Smith of killing the driver and said that Smith had admitted the killing to him, and White admitted that he had purchased the fatal gun from Smith, it was not error to charge the jurors, in effect, that if they believed that it was someone else, *i.e.*, Smith, who killed the D.S.R. driver they could, nevertheless, convict White of murder as an accomplice.

Nor did the judge err in instructing the jury that there were only two possible verdicts, guilty of murder in the first degree and not guilty. There was no request for instructions on lesser offenses, nor objection to the instructions given.

Affirmed.

stances required by the decisions of this Court and because the probable cause requirement was not met where the informant was not shown to be reliable.

However a thorough consideration of the pertinent decisions of this Court and of the facts in *White* demonstrates that the search and seizure was reasonable, though without a warrant, both because the automobile exception applies and because *Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973), applies.

The Michigan court traces the automobile exception from *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 2d 543 (1925), to *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971); referring also to *Cady*, *Cardwell* v *Lewis*,— US—; 94 S Ct 2464; 41 L Ed 2d 325 (1974), and *Almeida-Sanchez* v *United States*, 413 US 266; 93 S Ct 2535; 37 L Ed 2d 596 (1973). The opinion does not carefully articulate the relationship of *White* to these cases but only states that there are no exigent circumstances in *White* except perhaps that a gun was the object of the search. By implication, therefore, the court fits *White* under II-B of the plurality opinion in *Coolidge*.

To the contrary petitioner respectfully submits that *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), especially when viewed in the light of III in the plurality opinion in *Cardwell*, is controlling.

Chambers reiterates the principle that a warrantless search and seizure involving an automobile is reasonable if based upon probable cause when there are exigent circumstances grounded on the movability of an automobile. This Court went on to say:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 US, at 52.

It is expressly set forth in *Coolidge* that the Court does not question these principles, 403 US, at 482. The Court holds, however, that while there was probable cause to search Coolidge's car, there were no exigent circumstances, so that the automobile exception was inapplicable.

But *White* contrasts with *Coolidge* in that definite exigent circumstances do exist. As the Court pointed out in *Coolidge* the investigation had been proceeding with the defendant's knowledge for about three weeks. He had cooperated. He had had ample time to destroy evidence. However, in *White* the police had gained their reasonable belief that the defendant had committed the crime only minutes earlier and they were given to understand that the defendant would resist arrest. Unlike *Coolidge* where the object of the search was neither contraband, nor stolen goods, nor a dangerous weapon, *White* did involve a dangerous weapon. Moreover, in *White* the events occurred early in the morning of a holiday and a magistrate was not available. Furthermore in *Coolidge* the vehicle was parked in a private drive, so that a search and seizure thereof represented a greater intrusion than that in *White* where the car was parked on the public street. See *Cardwell* in this regard. And perhaps most importantly, whereas the car in *Coolidge* was secured from movement, the car in *White* could easily have been moved by the defendant's wife who had been alerted to the situation because she was present during her husband's arrest.

OPINION

(Supreme Court of the State of Michigan)

(People of the State of Michigan, Plaintiff-Appellee, v James White, Defendant-Appellant. No. 54222)

(Filed September 6, 1974)

Before The Entire Bench (except Levin, J., and Fitzgerald, J.)

Swainson, J.

A DSR bus driver named Lucian Fryling was fatally wounded during the night of November 18, 1964, at LaSalle Boulevard and Webb in the City of Detroit. Two eyewitnesses saw a man hurrying away from the bus after the shooting but they were not able to see the man's face.

One week later, on November 25, 1964, the police received information from a Joe Smith which led them to seek Dan Johnson, the informer and principal witness in this case. When Johnson learned that the police were looking for him, he reported to the precinct station. After being interviewed by the detectives in charge of the investigation, Johnson made a statement at approximately 12:30 a.m. on November 26 (Thanksgiving Day), 1964.

At the trial Johnson testified that he and appellant had gone to the scene where the killing occurred on four or five occasions to watch the buses and to plan the robbery of a bus driver. On the afternoon of November 18, 1964, the day of the shooting, they had discussed robbing a driver. The meeting took place in appellant's car and a third person, Bill Smith,* was present. Johnson claimed

* To avoid confusion it should be noted that the record clearly indicates that Joe Smith and Bill Smith are not the same individual.

he did not see appellant again that day. Johnson identified a gun found in the trunk of appellant's automobile shortly after he was arrested as the gun he had seen in appellant's bedroom one month before the killing, and said that appellant sometimes kept the gun in the trunk of his automobile. Both Johnson and the police testified that Johnson had told the police on the morning of November 26 everything he was then relating on the stand.

Acting on the information supplied by Johnson and without a warrant the police immediately went to appellant's apartment arriving at 2:15 a.m., November 26. The police officers knocked on the door. When appellant asked who it was, one of them replied that it was Jimmy Edwards. Appellant opened the door a crack and the police pushed their way into his apartment and arrested him.

After appellant was under their control, the police searched the apartment but did not find a handgun. The police then took appellant's keys and searched his car, which was parked on the street in front of the apartment house. A handgun was discovered in the car's trunk and was seized by the police.

Appellant was taken to police headquarters sometime before 4 a.m. on the morning of the 26th. He was not taken before a judicial officer for arraignment until 2 p.m. on the afternoon of the 27th. In the interim defendant was questioned several times and confronted with the handgun seized from his car and with Johnson's statement implicating appellant in the murder of the DSR but driver. According to the police, appellant made four unsigned statements during this period.

Appellant made unsuccessful pretrial motions to suppress the admission of the gun and his unsigned state-

ments. He was subsequently tried and convicted of first degree murder and sentenced to life imprisonment. The Court of Appeals affirmed the conviction in a per curiam opinion dated June 28, 1972, and this Court granted leave to appeal, 388 Mich 780 (1972).[1]

In this appeal we focus on appellant's two primary allegations of error.

1. Was the warrantless search of appellant's car, which was parked on the street in front of the apartment in which appellant was arrested, made in violation of the State and/or Federal constitutional rights to be free from unreasonable civil search and seizure?

2. Did the delay in appellant's arraignment and the nature of the interrogation process render appellant's statements inadmissible at trial?

I

Whenever the police intrude into a sphere of protected privacy without the prior authorization of a warrant issued by a neutral judicial officer, their conduct is subject to careful scrutiny by the courts. To sustain the validity of a warrantless search the burden rests on the People to demonstrate that the police acted in a reasonable manner, based on probable cause and in response to an exigent circumstance bringing the search under one of the specifically established exceptions to the warrant requirement. *Coolidge* v *New Hampshire*, 403 US 443, 454-455; 91 S Ct 2202; 29 L Ed 2d 564 (1971); *People* v *Mason*, 22 Mich App 595, 616-617; 178 NW2d 181 (1970). If the People fail to meet this burden it is the duty of our courts

[1] A detailed examination of the prolonged delay between trial and appellate consideration of this case is attached to this opinion.

to suppress the admission into evidence of any fruits of the unwarranted search. *Mapp* v *Ohio*, 367 S 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

The first step we must take in reviewing the search of appellant's parked automobile and the resulting seizure of the handgun is to determine if the warrantless search arguably fits within one of the exceptions to the warrant requirement. The People argue that the search was proper under what is generally described as the "automobile exception" and it is to the consideration of this exception that we now turn.[2]

The perimeters of the automobile exception have not been definitively established by the United States Supreme Court or by our state's courts. From the early leading case of *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925) to more recent cases such as *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), and *Coolidge* v *New Hampshire*, 403 US 443; 91

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[2] The only other exception that could possibly justify the search would be the exception for search incident to a valid arrest. Even assuming for the moment that appellant's arrest was valid the law extant in 1964 did not authorize the search of a vehicle parked outside of a person's home when the arrest was accomplished inside of the home. Compare, *Harris* v *United States*, 331 US 145, 67 S Ct 1098; 91 L Ed 1399 (1947) and *United States* v *Rabinowitz*, 339 US 56, 70 S Ct 430; 94 L Ed 653 (1950) with *Coolidge* v *New Hampshire*, *supra*, at 403 US 443, 455-457.

The most factually relevant Michigan case existing at the time of the present search and seizure, *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962), upholds the warrantless search of an automobile on the basis of the reasonableness of the police conduct and the presence of probable cause to search. The court declined to uphold the search as simply incident to an arrest. *Id.* at 365 Mich 494, 501. Likewise, in *People* v *Williams*, 383 Mich 549; 177 NW2d 151 (1970), the Court upheld a search of an automobile shortly after defendant's arrest on the basis of probable cause to search and the reasonableness of the search.

S Ct 2022; 29 L Ed 2d 564 (1971), the United States Supreme Court has resolved each case narrowly on its own facts based on the interrelated concepts of reasonableness and probable cause. Each new situation thus requires the courts to reflect on the rationale underlying the exception and to adopt the teaching of the prior cases to the facts of the case at bar. *Cf. Cady* v *Dombrowski*, 413 US 433, 439; 93 S Ct 2523, 2527; 37 L Ed 2d 706, 713 (1973).

In *Carroll* v *United States*, *supra*, the Supreme Court initially recognized that there were situations in which a warrantless search of an automobile would not violate the Fourth Amendment warrant requirement. Appellant Carroll challenged the authority of federal agents to stop and search his automobile for the presence of illegal liquor under the National Prohibition Act. The Court considered both the primary goal of the act—to seize contraband liquor rather than to prosecute violations—and the fact that the agents had probable cause to believe that illegal liquor was being transported in Carroll's moving vehicle. In this limited context the Court said:

> "We have made a somewhat extended reference to * * * show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed * * * as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect to which a proper official warrant readily may be obtained, and a search of a * * * automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 US 132, 153.

The Carroll Court certainly did not see itself as eliminating the warrant requirement simply because the object to be searched was a mobile vehicle. It emphasized that: "In cases where the securing of a warrant is reasonably practical, it must be used * * * ". 267 US 132, 156.

Again in 1949 the Court reviewed a situation involving the transportation of liquor contrary to law and upheld the search of defendant Brinegar's automobile after a highway stop on probable cause. *Brinegar* v *United States*, 338 US 160; 69 S Ct 1302; 93 L Ed 2d 1879 (1949). In the course of resolving the case before it, the Court repeated the narrow scope of the holding in *Carroll*.

> "The *Carroll* decision held that, under the Fourth Amendment, a valid search of a vehicle moving on a public highway may be had without a warrant, but only if probable cause for the search exists." 338 US 160, 164.

The Supreme Court first examined the warrantless search of a parked automobile in *Preston* v *United States*, 376 US 364; 84 S Ct 881; 11 L Ed 2d 777 (1964). In *Preston* the facts reveal that the police received a complaint at 3:00 a.m. that three unidentified men were acting suspiciously and had been sitting in a parked car in a business district since 10:00 p.m. The police investigated the complaint and questioned the occupants of the car. The police then arrested the three men for vagrancy and had the automobile removed to a police garage. Later, they searched the car at the police garage and seized two loaded revolvers and other evidence that was used against Preston at his trial on charges of conspiracy to rob a federally insured bank.

Mr. Justice Black writing for the Court found the search of the automobile at the police garage to be unreasonable. At the time the occupants were arrested the police did not

search incident to arrest nor did they have probable cause to search the vehicle itself. After the car was in police custody, there was no danger of its removal and therefore no circumstances making a warrantless search reasonable. Broadly interpreting the prior automobile exception cases, Justice Black wrote:

> "Our cases make it clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before the evidence obtained as a result of such searches is admissible." 376 US 364, 366.

See also, *Cooper* v *California*, 386 US 58; 59-60; 87 S Ct 788; 17 L Ed 2d 730 (1967); *Dyke* v *Taylor Implement Manufacturing Co*, 391 US 216; 88 S Ct 1472; 20 L Ed 2d 538 (1968).

Then, in a case that at first appears to be departure from past precedent, the Court in *Chambers* v *Maroney*, *supra*, upheld the validity of warrantless search of an automobile taken into police custody after its occupants were stopped, and arrested on robbery charges. The Court speaking through Justice White, however, did not perceive the holding in *Chambers* as stating a different rule of law than that found in the prior automobile exception cases. In *Chambers* the police had the requisite probable cause to search the automobile for weapons at the time that it was stopped and its occupants arrested. Justice White then argued that since there was originally probable cause to search, the police in essence did not intrude into an area of protected privacy in any greater degree by searching the car when it arrived at the station house than they would have by immobilizing it until a warrant could be obtained.

The *Chambers* Court was, in fact, very mindful of the past cases. In reaching its result it recognized that there

was not an "automobile exception" *per se* but rather an exception that allowed for warrantless searches of moving vehicles based on probable cause.

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll*, *supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." 399 US 42, 51.[3]

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[3] Insight into the limits of the automobile exception may also be found in the later dissenting opinion of Justice Brennan in *Cady* v *Dombrowski*, 413 US 433, 451:

> "But the search of the Thunderbird plainly cannot be sustained under the 'automobile exception,' for our prior decisions make it clear that where, as in this case, there is no reasonable likelihood that the automobile would or could be moved, the 'automobile exception' is simply irrelevant."

See also, *Cardwell* v *Lewis*, — US —; — S Ct —; — L Ed 2d —; 42 USLW 4928, 4932-4933 (1974) (Stewart, J., dissenting):

> "[T]he *Carroll* doctrine simply recognizes the obvious—that a *moving* automobile on the open road presents a situation 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' *Carroll*, *supra*, at 153. See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 269. Where there is no reasonable likelihood that the automobile would or could be moved, the *Carroll* doctrine is simply inapplicable. See, *e.g.*, *Coolidge*, *supra*; *Preston* v. *United States*, 376 U.S. 364."

The most recent automobile exception case factually relevent to appellant White's case is *Coolidge* v *New Hampshire, supra.* Although decided by the Court in 1971, *Coolidge* reviewed police conduct taking place in 1964 and 1965. In terms of the dates involved and the character of the search performed, *Coolidge* bears a great similarity to the present case.

The essential facts in *Coolidge* indicate that the police went to speak to Coolidge at his home on January 28, 1964, in the course of investigating a murder that had been committed earlier that month. *Coolidge* spoke to the police and accompanied them to take a lie detector test after which he was not arrested. The police continued their investigation and on February 19, 1964, returned to Coolidge's home and arrested him on the murder charge. At the same time the police seized Coolidge's automobile parked in his driveway and towed it to the station house where it was searched without a valid warrant.[4] Vacuum sweepings from the interior of the car were seized and later admitted into evidence over objection. Coolidge was thereafter convicted of the murder.

In examining this search the Court[5] found the automobile exception inapplicable. "Here there was probable cause, but no exigent circumstances justified the police in

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[4] The police had obtained a warrant to search but the Court held the warrant invalid since it was issued by the state attorney general rather than a neutral magistrate. 403 US 443, 449-453.

[5] The Court spoke through a plurality opinion authored by Justice Stewart. Justices Douglas, Brennan and Marshall joined in the opinion of Justice Stewart on the automobile exception issue, part II-B of the opinion. Justice Harlan also concurred with the above Justices in part II-D of *Coolidge* that found no exigent circumstances present to justify a warrantless seizure of the automobile.

proceeding without a warrant". 403 US 443, 464. The facts in *Coolidge* placed the seizure outside of the reasonable limits for warrantless searches.

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll* v. *United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant.' ". 403 US 443, 461-462.

Following the instruction of these United States Supreme Court precedents, we have serious doubts that the People have sustained their initial burden of demonstrating that the search here in issue fits within the perimeters of the automobile exception to the warrant requirement. The appellant's automobile was parked and unoccupied when the police arrived with an ample number of officers to allow the automobile to be guarded while a warrant was sought. The one circumstance, in our analysis, that might arguably support the reasonableness of the warrantless search was the police suspicion that a weapon was located in the automobile; but a legal basis for the proposition that the suspected presence of a gun alone proves an exigent circumstance is derived only from the *dicta* in *Coolidge*. The presence of a weapon did not alter the Supreme Court's analysis in either *Preston* v *United States, supra,*

or *Dyke v Taylor Implement Manufacturing Co, supra.* Furthermore, even this *Coolidge dicta* may be read to indicate that the presence of a weapon is only one factor in creating, and not the sum total, of an exigent circumstance. See, for example: *Cady v Dombrowski, supra.*

Based then on the case law and the basic requirement of search and seizure law, we are inclined at this point to hold that the warrantless search and seizure of appellant's automobile was unreasonable, and therefore not within the automobile exception. In our opinion, however, it is not necessary to test our decision on this basis alone. "The reasonableness of any search or seizure must be determined as of the time of search or seizure. In the determination of reasonableness, consideration may be given to the information possessed by the police officer." *People v Tisi*, 384 Mich 214, 219; 180 NW2d 801 (1970). In the present case, the nature of the information on which the police acted also leads us to conclude that the warrantless search was unreasonable.

The police had not focused on appellant as a suspect in the homicide until after they had questioned Dan Johnson. Then, acting solely on the information supplied by Johnson, the police arrested appellant and searched his apartment and car and siezed the handgun. From the record we learn that the police first sought out Dan Johnson on November 25th after a Joe Smith had reportedly given the police information leading them to Johnson. After Johnson learned the police were looking for him, he voluntarily reported to the station house. The police interviewed Johnson at the station house who, according to his own trial testimony, met an initial physical description given to the

police by one of the witnesses at the scene of the shooting.[6] Then, early in the morning of November 26th, Johnson made a statement indicating that although he was not a witness to the shooting, he had reason to believe that appellant was probably the person responsible for the homicide.

The record, however, reveals no prior contact between the police officers and Johnson that would have allowed them to assess his reliability. Neither is there any indication that the police officers had available or knew of sufficient facts to corroborate the details of Johnson's statement prior to their arrest and search of appellant. All we can gather from this record is that the police first acted on the information by arresting and searching appellant and thereafter obtained a material witness warrant against Johnson under which he was detained until he testified against appellant at trial.[7]

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[6] The record does not clearly indicate the precise reason that the police questioned Johnson—whether they considered him a suspect or merely a lead to further information. The People did not produce Joe Smith nor did they indicate the substance of the information regarding Johnson that Joe Smith gave to the police. The record does indicate, however, that Johnson did meet part of the vague description (6 feet tall, 170 pounds) given by one of the witnesses to the police shortly after the shooting.

Since the People carry the burden of proving probable cause for the police actions, we in this case, must accept the inference from the record that is most favorable to appellant. We, of course, do not express any belief or suspicion that Dan Johnson was in fact involved in the shooting of the DSR bus driver. We look only to determine if the police could use his statement without corroboration as their sole basis for a warrantless search of appellants' automobile.

[7] We note that Johnson did not fit into the category of either a police officer, victim or uninvolved eyewitness that would allow the police, without more, to credit his reliability. *McCreary* v *Sigler*, 406 F2d 1264, 1269 (CA 8, 1969) cert den, 395 US 984; 89 S Ct 2149; 23 L Ed 2d 773(1969); *People* v *Lewis*, 240 Cal App 2d 546, 550; 49 Cal Rptr 579 (1966); 37 Mo L Rev 538, 541 (1972). Thus, the People must be able to point to some evidence in the record that indicates that the police had reason to believe that Johnson was providing them with reliable information.

Under the law extant at the time of the search we find that the police did not have a sufficient basis to credit Johnson's statement as reliable. The present facts form a marked contrast to the information held sufficient to justify a warrantless search in *Draper* v *United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959). In *Draper* the police acted on information from an informer who had previously provided them with reliable and accurate information of criminal activity and arrested Draper with heroin in his possession. Even then, however, Draper was not arrested until several aspects of the informer's statement were visually verified. The police were not required under the holding in *Draper* to verify the fact that Draper possessed heroin prior to the arrest but they were required to be reasonably certain of the truth of the informer's statement before they acted. "[W]ith every other bit of [the informant's] information being thus personally verified, [the narcotics agent] had 'reasonable grounds' to believe that the remaining unverified bit of [the informant's] information—that Draper would have the heroin with him—was likewise true." 358 US 307, 313. Accord, *Whiteley* v. *Warden*, 401 US 560; 91 S Ct 1031; 28 L Ed 2d 306 (1971); *People* v *Tisi*, 384 Mich 214, 219; 180 NW2d 801 (1970).[8]

Johnson's statement could have been used lawfully as an investigative tool and a "lead" to interview appellant White. The police also could have attempted to corroborate its details prior to the arrest and search and presented their information to a judicial officer for his deter-

[8] Compare also *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962) where this Court found sufficient probable cause to search defendant's car trunk after defendant stated to the police that a quantity of marijuana was stored there.

mination as to whether a warrant should issue. The police, however, did none of these things. Rather, they proceeded to conduct a warrantless search.

The judicial preference for searches conducted under the authority of a search warrant should be expressed not only in terms of the narrowly drawn exceptions to the warrant requirement but also in terms of a more stringent standard of review applied to all aspects of warrantless searches. The courts thereby encourage police officers to seek a warrant before acting.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." * * * (Footnote omitted.) *Johnson v. United States*, 333 US 10, 13-14; 68 S Ct 367; 92 L Ed 436 (1948). See also, *Jones v United States*, 362 US 257, 271; 80 S Ct 725; 4 L Ed 2d 697 (1960); *Whiteley v Warden*, 401 US 562, 566; 91 S Ct 1031; 28 L Ed 2d 306 (1971).

In this case we conclude that the police proceeded to conduct a warrantless search in a situation that did not present an exigent circumstance and on the basis of questionably reliable information. The decision of the trial court denying appellant's motion to suppress was erroneous.

The search and seizure violated the protection of the Fourth and Fourteenth Amendments and Const 1963, art 1, § 11. The introduction of the gun as evidence should have been suppressed.

II

The second issue we must review is appellant's contention that the trial judge erred by failing to suppress certain admissions made to the police after arrest but before arraignment. Factually, the record reveals that the following events occurred between the time of appellant's arrest on November 26 and his arraignment on November 27.

November 26, 2:30 a.m.—Appellant arrested and taken to police headquarters.

4 a.m.—Appellant was questioned at police headquarters Homicide Bureau by Detectives Eifrid and Rohn. The police claim that appellant was advised of his constitutional rights; appellant states that no warnings were given him at this time.

Appellant was confronted with the hand gun seized and, according to the police, made a statement, never signed, accounting for his activities on the evening of November 18, 1964. Appellant also stated that he purchased the seized hand gun on November 24, from Bill Smith and had placed it in his car trunk where it remained until seized by the police. This first interrogation ended at about 5 a.m.

7:30 a.m.—Appellant was again questioned by Detectives Eifrid and Rohn. Appellant admitted being informed of his constitutional rights. He was then confronted with a ballistics report linking the seized gun to the homicide and with Johnson's statement. Appellant, according to the police, now disclaimed his 4 a.m. statement and said he wanted to make a new statement. This statement, never signed, related that appellant was originally trying to protect Bill Smith, who had admitted the shooting to him. Appellant said he

purchased the gun from Smith only after Smith assured him that it had not been used as a murder weapon.

8:30 a.m.—Appellant was placed in a cell block at police headquarters.

12 noon—The police claim that appellant was fed for the first time. Appellant maintains he was not fed until 3 p.m.

4 p.m.—Appellant was interrogated by officers from the Holdup Squad concerning an unrelated crime.

7:30 p.m.—Appellant was interrogated by Detective Eifrid. According to the detective's testimony, appellant was read in full Dan Johnson's statement relating how Johnson and appellant on several occasions had watched coaches with an intent to rob the drivers but had never done so. Eifrid testified that after their hearing the statement appellant "stated that it was true, except that Dan Johnson was trying to place too much blame on him [Appellant]." (T-60.)

8 p.m.—Appellant consulted with an attorney.

November 27, 11:40 a.m. —Appellant being concerned that he had not as yet been taken to court, asked a turnkey if he could see someone related to his case. Detective Rohn responded to talk to appellant. Appellant stated that this interview was limited to determining when he was going to court and if the police had located Bill Smith. In contrast, Detective Rohn testified that when he entered the interview room, appellant "stood up, tears started to come down his cheeks. He turned and faced the wall and he made the remarks, 'I didn't mean it, he lunged at me and

the gun went off.'" (T-29.) Detective Rohn testified that appellant then quickly regained his composure and stated that he was referring to Bill Smith and not to himself.

2 p.m.—Defendant was arraigned in court on a charge of first degree murder.

In this pre-*Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR 3d 974 (1966) situation, we first examine the admissibility of appellant's statements under the Michigan statutory requirements governing the arrest-arraignment process.

The statutes governing the arrest-arraignment process provide that after a defendant has been arrested on felony charges he shall be taken before a magistrate for arraignment "without unnecessary delay." MCLA 764.13; 764.26; MSA 28.871(1); 28.885. These sections, while straightforward in their command to the police, have not been interpreted by this Court or require the exclusion of every admission or confession obtained during a period of unreasonable delay. Only when the delay has been employed as a tool to extract a statement has an exclusionary rule been imposed under these sections. *People* v *Hamilton*, 359 Mich 410; 102 NW2d 738 (1960); *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962); *People* v *Farmer*, 380 Mich 198; 156 NW2d 504 (1968).

In the present case the trial judge acted within the bounds of his discretion when he held appellant's statements admissible. The police, in our opinion, should have acted promptly in bringing appellant before a magistrate. The fact that November 26 was Thanksgiving Day was, in itself, no excuse for delay. *People* v *Hamilton*, 359 Mich 410, 417; 102 NW 2d 738 (1960). Even assuming, how-

ever, that the delay was unnecessarily long, we cannot say that the trial judge was, under the present record, required to find that the police used the delay as a tool to further their interrogations.

The trial judge could have reasonably accepted the police testimony that appellant was repeatedly warned of his constitutional rights before being questioned. Appellant also had an opportunity to consult with a lawyer. Moreover, the most damaging of appellant's alleged statements, that made on November 27th, was not the product of a police interrogation. Appellant requested the November 27th interview with the police officers and, according to police testimony, volunteered his statement as soon as the detective arrived.

We are also unable to accept appellant's contention that the interrogations were of a coercive nature in violation of his constitutional rights. We are mindful that the People carry the burden of proving voluntariness. *People* v *Zeigler*, 358 Mich 355, 364; 100 NW2d 456 (1960). Our independent review of the record, however, again indicates that the trial judge reached a decision that was reasonable under the facts of this case.

Likewise, we find appellant's citation to *Fahy* v *Connecticut*, 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963) unpersuasive. In *Fahy* the Supreme Court held that it was error to not allow Fahy "a chance to show that his admissions were induced by being confronted with the illegally seized evidence." 375 US 85, 91. In the present case appellant's trial counsel argued both the illegality of the seizure of the gun and the inadmissibility of appellant's statements. Counsel, however, did not ask the court to determine if the confrontation with the illegally seized weapon had "induced" appellant to make his state-

ments. Therefore, we find no error under *Fahy* on the part of the trial judge.[9]

The Court of Appeals is reversed in part and affirmed in part. This case is remanded for a new trial.

/s/ John B. Swainson
/s/ Thomas M. Kavanagh
/s/ Thomas Giles Kavanagh

APPENDIX

This case has taken 10 years to reach this Court on original appeal. We cannot avoid our duty to comment upon the negligent and cavalier manner in which this case has proceeded to final appellate consideration. During these ten years Mr. White has remained in prison when, as we hold today, he was entitled to a new trial. The people also have surely been prejudiced by this delay. It will undoubtedly be difficult to find witnesses and prepare for a new trial concerning events that occurred in 1964. See, *People* v *Thomas*, 390 Mich 93, 95; 210 NW2d 776 (1973).

These proceedings have taken every conceivable turn. Appellant's arrest and trial took place in a relatively normal period of time from November 1964 to April 1965. The appellate process began in April 1965 with the appointment of Willis F. Ward as counsel. Mr. Ward subsequently was appointed to the Michigan Public Service Commission (MPSC). Commissioners are prohibited from

[9] Appellant, of course, may move to have his statements suppressed under *Fahy* v *Connecticut*, as part of the normal procedures incident to the new trial that we find is required under Part I of today's opinion. *Cf. People v Kennedy*, 384 Mich 339; 183 NW2d 297 (1971).

practicing law in addition to their position. Mr. Ward requested attorney Clayton L. Davis, Jr. to inform the Recorder's Court of Ward's inability to pursue the appeal. Mr. Davis finally wrote in September 1966 (1½ years later); and requested to be appointed substitute appellate counsel.* Over the next three years Mr. Davis failed to proceed with any speed and demonstrated a lack of diligence in pursuing the matter. In 1967 he sent appellant one letter reporting work on the case was in progress. Appellant contacted Mr. Davis several times requesting action. When these efforts proved fruitless, appellant wrote the Supreme Court Administrator to enlist his aid in obtaining effective assistance of counsel. The inquiry of the Administrator motivated Davis to "promise" to file an *Application for a Delayed Motion for a New Trial* in May, 1968. The motion was finally filed in January 1969. The motion was opposed by the prosecutor's office and denied in May 1969 by the Recorder's Court. Action on the case then rested another nine months, until February 1970 when Davis was dismissed as counsel under the direction of the Supreme Court Administrator.

Mr. Joseph Freed was appointed new appellate counsel and work began again on appellant's appeal. Mr. Carl Ziemba then became associated with the appeal. The record indicates Mr. Freed handled much of the early proceedings, and Mr. Ziemba the later proceedings.

The administrative morass in which appellant was entangled tripped on its own feet, however, with the extra

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* Mr. Ward retained responsibility for proceeding with appellant's appeal until Mr. Davis was formally appointed substitute appellate counsel. Subsequently, Mr. Ward was assessed $100 court costs by the Court of Appeals for failure to meet the time limits required to preserve appellant's appeal as of right.

appointment of Mr. M. Hector Cisneros as counsel. Mr. Cisneros promptly withdrew when informed of the appointment of Mr. Freed. Through most of 1970 Freed battled to prepare the case, experiencing among other hurdles, difficulties in obtaining trial transcripts. The matter was finally on its way to consideration by the Court of Appeals in late 1970. Then in December 1970 the Prosecutor obtained the first of many time extensions which put the matter over into 1971. Leave for Delayed Application to Appeal was granted by the Court of Appeals March 23, 1971, a long 6-½ years after appellant White was first incarcerated.

There were several prosecution delays in filing briefs through the summer of '71. The case was scheduled for hearing for the Fall. On October 11, 1971, *People* v *White* was finally heard by the Court of Appeals. Eight months later, on June 28, 1972, the Court of Appeals issued its opinion affirming the conviction. The case was immediately appealed to the Supreme Court. In September, 1972, it was necessary for this Court to remand the case to the Recorder's Court for a determination of indigency. Indigency was found and on December 5, 1972, the State Appellate Defender, Mr. White's fifth counsel, was assigned the case.

The case moved slowly through the Supreme Court proceedings in 1973. Appellant was granted two extensions of time to file his brief in March 1973. Notice of hearing was given August 6, 1973, and the appeal finally argued and submitted October 3, 1973. This case has been under consideration since that time.

Williams and Coleman, JJ. (To Affirm)

Justice Swainson has written a perceptive opinion which graphically demonstrates the difficulty of grappling with warrantless automobile search and seizure questions under the Fourth Amendment. With Justice Swainson, we are persuaded that this Court must do all that is appropriate to persuade law enforcement officers to make every reasonable effort to employ search warrants in order to safeguard our constitutional right of privacy. We are convinced that is the purpose and interest of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

However, on the facts in the instant case, we hold that the police acted within the bounds of the Fourth Amendment with respect to their search of appellant's car. We agree with Justice Swainson on the second issue.

I—FACTS

At approximately 8:00 p.m. on the evening of November 18, 1964, a DSR bus driver was slain. Moments after the fatal shots two eyewitnesses saw a man hurry from the bus in which the slain bus driver lay. Although the witnesses were unable to see the man's face, nevertheless they retained and later related to the police a general description of the fleeing man.

Approximately a week later, one Dan Johnson, upon learning that the police were looking for him in connection with this crime voluntarily appeared at a precinct station. He informed the police that he had reason to believe that the appellant, James White, was responsible for the death of the bus driver. He recounted that he had been at the scene of the crime with the defendant, James White, four or five times between 7:00 and 9:00 p.m. on evenings preceding the crime. Their purpose for these visits was to plan a robbery of a bus driver. Johnson further informed the police that earlier on the night in question he had been with defendant. At that time defendant asked Johnson what he was doing around 7:00 p.m. because he (James White) was going to get a bus. This meeting took place in defendant's car. A third person, Bill Smith, was present. Johnson also informed the police that he had seen a gun in defendant's bedroom and that defendant kept a gun such as the one described as the murder weapon in either a bedroom drawer or in the trunk of his automobile "under some rags." Acting upon this information received sometime between 1:00 and 2:00 a.m., the police arrested White at his apartment around 2:15 a.m. Thanksgiving Day. The police asked White for his car keys and, upon receiving them, searched the trunk of his car parked

on the street in front of the apartment. There, "under some rags," the police found the murder weapon, the suppression of which is the subject matter of this opinion.

II—*COOLIDGE; PRESTON; CADY*— AUTO SEARCHES

Justice Swainson relies heavily on *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971). However, *Coolidge* specifically *excepts* hypothetical facts which more than the facts in *Coolidge* itself relate directly to the instant case. The *Coolidge* Court said:

> "Even assuming, *arguendo*, that *the police might have searched the Pontiac in the driveway when they arrested Coolidge in the house, Preston* v *United States*, 376 U.S. 364, makes plain they could not legally seize the car, remove it, and search it at their leisure without a warrant." [Emphasis added.] 403 US 443, 457.

The *Coolidge* hypothetical facts differ from *White* only in that in *Coolidge* the car was in the driveway and in *White* across the street, the difference between suburban and urban living.

Moreover, in *White* there was a reason for search that does not appear in *Coolidge*, namely that the police had probable cause to suspect the murder weapon was in the car. In *Coolidge*, the Court said "[t]he objects [vacuum sweeping of microscopic particles to show presence of gun powder and murder victim] that the police are assumed to have had probable cause to search for in the car were neither stolen, nor contraband nor dangerous." 403 US 443, 460. That is probably why the Court also said

"[h]ere there was *probable cause*, but no *exigent* circumstances justified the police in proceeding without a warrant." [Emphasis added.] 403 US 443, 464.

This brings us to *Preston* v *United States*, 376 US 364; 84 S Ct 881; 11 L Ed 2d 777 (1964) where the Court speaks more positively even than in *Coolidge* about the reserved exception. In *Preston*, the Court said:

> "Here, we may assume, as the government urges, that either because the arrests were valid or *because the police had probable cause to think the car was stolen*, the police had the *right to search the car when they first came on the scene*. But this does not decide the reasonableness of a search at a later time and at another place." [Emphasis added.] 376 US 364, 367-368.

The *Preston* hypothetical is closer to *White* even than the *Coolidge* hypothetical is, because of two factors: first, the *Preston* hypothetical speaks firmly of "probable cause" and second the *Preston* hypothetical speaks of the police conducting the search "when they first came on the scene." This reference is to "exigent circumstances" because, while the car was temporarily parked, the car was occupied and could have been driven away just as surely as a car stopped on the highwy. See *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925). Both factors are present in *White*—the *Coolidge* search was made only after a lengthy investigation of over a week.

It would be stretching *Coolidge* to say on the basis of the hypothetical exception that it was precedent for upholding the search in *White*. However, on the other hand,

it would be inaccurate to say that *Coolidge* controls *White* against the validity of the search.[1]

Likewise, *Preston* on the basis of its hypothetical cannot be said to be four square precedent for the reasonableness of the search in *White*, because the defendants were in a parked car at the time of the search of the car, whereas White was in his apartment room across the street. However, *Preston* cannot be said to be precedent against the validity of the *White* search. In fact, *Preston* in this hypothetical seems to extend the probable cause rule from moving cars to parked cars, at least if the defendants are in them, although already arrested. In *White*, of course, the defendant was arrested and in custody but his wife and Bill Smith were not.

This brings us to *Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973). *Cady* justified a search where the defendant had been arrested for an automobile accident while drunk and taken to the police station and his wrecked car had been hauled to a private garage. Two or three hours after the arrest the police searched the car without a warrant to look for the defendant Chicago police officer's service revolver. The Court concluded its consideration of this part of its opinion in these words:

> "Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold the search was not unreasonable within the meaning of the Fourth and Fourteenth Amendments." 413 US 433, 448.

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[1] We do not believe Justice Swainson says it does.

In reaching this conclusion the Court said that the police had exercised a form of custody, and that search was standard police procedure, in order to bring the case closer to *Harris* v *United States*, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968) and *Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967). 413 US 433, 442, 443, 445. However, it is obvious that the danger of the weapon falling in the wrong hands is the Court's primary concern. For example, it says:

> "In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper:* concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." 413 US 433, 447.

What lessons do we learn from *Coolidge*, *Preston* and *Cady?*

(1) The Fourth Amendment protects the public against *unreasonable* search and seizure. The ultimate test is whether the officers' actions under all the circumstances surrounding the search were reasonable. That was the test in 1964 and that is the test today.

(2) Neither *Coolidge* nor *Preston* is precedent against the reasonableness of the search in *White;*

(3) *Coolidge* and *Preston* are support but not four square precedent for *White;*

(4) *Cady* is strong support but again not four square precedent for *White;*

(5) *Coolidge* articulates the underlying principle patently or latently present in all the pertinent cases,[2] namely the Siamese twins of reasonable warrantless search: "probable cause" and "exigent circumstances." The Court said:

> "Here there was *probable cause*, but no *exigent circumstances* justified the police in proceeding without a warrant." [Emphasis added.] 403 US 443, 464.

The Court in *Coolidge* emphasized tests for "exigent circumstances" in finding there were none in *Coolidge*. The Court said:

> "In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.' The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous." 403 US 443, 460.

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[2] Excluded from this discussion are the so-called custody cases: *Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967), and *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970).

(6) Where there is "probable cause" and the search is contemporaneous and nearby (defendants in parked car—*Preston;* defendant in house, car in driveway—*Coolidge)* the search may be constitutional;[3]

(7) Where there was "probable cause" to believe the defendant's weapon might be in the car and there was natural concern that the weapon might fall into the wrong hands (an exigent circumstance) search in a car sent by the police to a private garage several miles from the police station where the defendant had been under arrest and in custody for more than two hours was held reasonable. The car was said to be in partial custody of the police and

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[3] See *Dyke* v *Taylor Implement Manufacturing Co*, 391 US 216, 221; 88 S Ct 1472; 20 L Ed 2d 538 (1968):

"Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. *Brinegar* v *United States*, 338 U.S. 160 (1949); *Carroll* v *United States*, 267 U.S. 132 (1925). The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."

And see, *Chambers* v *Maroney*, 399 US 42, 49, 51; 90 S Ct 1975; 26 L Ed 2d 419 (1970):

"'The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for a belief that the contents of the automobile offend against the law.'" [Quoting from *Carroll* v *United States, supra.*]

* * * * *

"Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search."

the weapon search was said to be standard police procedure in such a case. *Cady*.[4]

III—GENERAL LEGAL OBSERVATIONS

While *Coolidge*, *Preston* and *Cady* are closest to precedent for *White*, a few more general observations on the background law are in order.

To begin with, it is fair to report that *Chmiel* v *California*, 395 US 752, 755; 89 S Ct 2034; 23 L Ed 2d 685 (1969), one of the more recent of the leading cases in the field, said in passing:

> " . . . The decisions of this Court bearing upon that question [warrantless search incident to arrest] have been far from consistent . . . " 593 US 752, 755.

Furthermore, an earlier case, *Harris* v *United States*, 331 US 145, 150; 67 S Ct 1098; 91 L Ed 2d 1399, 1947), made the following remark:

> " . . . The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' *Go-Bart Importing Co* v *United States*, 282 US 344, 357 (1931)."

To return to *Chimel*, the Court there said:

> "Thus although '[t]he recurring question of the reasonableness of searches' depend upon 'the facts and

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[4] Whatever the validity today, under Supreme Court cases, of the Michigan cases, *People* v *Harper*, 365 Mich 494; 113 NW2d 808 (1962) and *People* v *Williams*, 383 Mich 549; 177 NW2d 151 (1970), decided prior to *Cady*, they are distinguishable from *White*, first, in that the arresting officers did not, when they came upon the scene in the former cases know what they were looking for in the car searched, and, secondly, because they did not have the "exigent circumstances" present that the instant case presents.

> circumstances—the total atmosphere of the case' *id.*,[5] at 63, 66 (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles." 395 US 752, 765.

Finally *Chambers* v *Maroney*, *supra*, 399 US 42, 48, made a point which underlies many of the cases:

> "In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office."

See also *Dyke* v *Taylor Implement Manufacturing Co*, *supra*, 391 US 216, 221; *Brinegar* v *United States*, 338 US 160, 176-177; 69 S Ct 1302; 93 L Ed 1879 (1949); *Carroll* v *United States*, *supra*, 267 US 132, 151.

In passing, the article, "Warrantless Searches and Seizures of Automobiles," 87 Harv L Rev 835 (1974), presents a fairly workable rule of thumb with which to proceed:

> "In black letter law, the basic rule for warrantless automobile searches and seizures is easy to state: a car may be searched or seized without warrant if there are both exigent circumstances and probable cause to believe that the car will yield contraband or evidence useful for prosecution of crime." *Id*, 835.

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[5] Referring to *United States* v *Rabinowitz*, 339 US 56; 70 S Ct 430; 94 L Ed 653 (1950).

IV—APPLYING *COOLIDGE, PRESTON & CADY* TO *WHITE*

A.—Critical Factors in White

In the light of these lessons from *Coolidge, Preston* and *Cady,* plus other salient case observations,[6] the critical factors in *White* are:

1) *White* involves a crime of violence, murder, and an unlocated gunman said to be dangerous;

2) The police learned of the identity and whereabouts of the alleged murdered between 1 A.M. and 2 A.M. Thanksgiving morning, a day when no magistrate was available [45a; 77a; Trial Transcript, p 5]

3) The informer "told us [the police] the pistol was either in his bedroom [drawer] or in the trunk of the car" "under some rags." The car was described as a "'56 Ford . . . yellow two door, had a big dent in the back of the trunk" with an outside padlock [26b-27b; 8b; 28b; 85a; 81a-82a];

4) The informer described the hand gun which he had seen in the alleged murderer's possession before the murder. Incidentally he identified it at trial and a ballistics expert tied the murder bullet to that weapon [25b; 38b-39b; 23b-24b; 89a-90a];

5) The police were informed that the alleged murderer had a gun and "was going to resist arrest if any policemen came to take him" [6b];

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[6] See "Warrantless Searches & Seizures of Automobiles," 87 Harv L Rev 835 (1974).

6) The police were concerned that the murder weapon not be destroyed [2b].

B.—Application of Law to White

Checking our own criteria and having in mind the "atmosphere" test and the twin requirements of exigency and probable cause, we begin by distinguishing the facts in *White* from those in *Coolidge* where the investigation had lasted over a week with the cooperation of the defendant, with no indication of flight on his part and where there had been "ample opportunity to destroy any evidence he thought incriminating." As the Court remarked in *Coolidge*, there was no exigent imperative.

White on the other hand reeks with exigent imperatives.[7] To begin with, there is a murderer loose who is alleged to be dangerous, the police learn of his whereabouts between 1 and 2 A.M. Thanksgiving morning. Upon arrest at about 2:15 A.M. the same morning and search of his apartment the alleged murder weapon is not found but the information received is that the gun if not in the bedroom is in the trunk of an aptly described car which should be at that hour, and was, parked nearby across the street. While the defendant is under arrest, his wife and Bill Smith are not and there is always the possibility that one of them could remove the car or the gun. In addition there exists the possibility that the weapon will fall into the wrong hands. Because it is Thanksgiving Day and before

[7] We do not suggest exigent circumstances would not be established by factors not as numerous or persuasive as these. We merely emphasize that in this case the circumstances are overwhelmingly supportive of such a finding.

daylight the possibility of finding a magistrate to secure a warrant is illusory.[8]

While certain of the accessory facts in *Cady*, such as semi-police custody of the car, (but see *Preston*) and standard procedure, are not present in *White*, the facts in *White* certainly argue as strongly for reasonableness, especially in light of *Cady's* real rationale for intrusion into the vehicle: "Concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." 413 US 433, 447.

Additionally, the negative pregnant in *Coolidge* states that there were "no exigent circumstances" (403 US 443, 464) where, among other things, there had been "ample opportunity to destroy any evidence he [the defendant] thought incriminating." (403 US 443, 460.) Putting it the other way around, where there is an opportunity to destroy evidence that is an exigent circumstance. The defendant's wife, who was with defendant at the time of arrest and witnessed the police search in the apartment for evidence might very well have "destroyed [the] evidence" or removed the gun from the trunk of defendant's car, had the police not done so.

So much for the posture of the case relative to the "exigency" required to justify a warrantless seaerh.

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[8] The inability of the police to get a magistrate to consider issuing a warrant before sunup or at any time during Thanksgiving Day, we believe goes to "exigency." Support for this view is found in *Carroll* v *United States, supra. Coolidge* endorses this *Carroll* point of view at 403 US 443, 459-460, as follows:

> "The underlying rationale of *Carroll* and of all the cases that have followed it is that there is
>
> " 'a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where *it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' 267 U.S. at 153. (Emphasis supplied [by *Coolidge*].)

As to the officers' "probable cause," the informer, who identified himself as having known the defendant for some time, as having plotted similar bus thefts and as having been with the defendant shortly before the crime, described defendant in a manner to conform with police information about him. Furthermore, the informer not only told the police where to find the defendant but that the alleged murder weapon would be in one of two places, the latter being the car trunk, where it was found. The *White* case for "probable cause" seems at least as strong as *Cady*. See also *Coolidge* and *Preston*.

The sum of the circumstances—the general atmosphere—support the reasonableness of the search, especially in view of *Cady* and the reserved exceptions in *Coolidge* and *Preston*.

V—INFORMER CREDIBILITY

Justice Swainson goes in back of the search to the reliability of Dan Johnson upon whose information the police found probable cause to arrest defendant. His opinion notes that the record reveals no prior contact between the police officers and Johnson until he walked voluntarily into the police station.

However, once there Johnson informed the police that he and the appellant had gone to the scene of the crime on several occasions to watch buses and plan a robbery of a bus driver. The latest discussion as to a robbery took place on the day of the crime. Johnson related that defendant owned a handgun which he had seen and which at times defendant kept in his automobile. The handgun described by Johnson was the type used in the slaying of the bus driver.

Johnson's information was based upon his personal experience and knowledge. This is sufficient to satisfy the requirement that Johnson acquire his information in a trustworthy fashion. Moreover, his detailed story, corroborated in detail by the information the police already possessed, was, in this case, sufficient basis to establish his credibility.[9] See *People* v *Tisi*, 384 Mich 214; 180 NW2d 801 (1970).

Here the police had probable cause to believe that the murder weapon was in the trunk of the car. Common sense and our duty to pay appropriate deference to a determination of probable cause by the trial court compel us to conclude that the police had adequate cause to rely upon the information of Dan Johnson and that the resultant search was indeed reasonable.

VI—APPELLANT'S STATEMENTS ADMISSIBLE

We concur in Justice Swainson's analysis on this point.

VII—CONCLUSION

We would affirm.

/s/ Mary S. Coleman
/s/ G. Mennen Williams

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[9] Justice Swainson points to *Draper* v *United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959) as stark contrast to the instant case. However, the Court in *Draper* noted:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v *United States*, *supra*, at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v *United States*, 267 U.S. 132, 162." [Footnote omitted.] 358 US 307, 313.